IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BRANDON M.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND E.C.,
Appellees.

No. 2 CA-JV 2019-0046
Filed October 9, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Cochise County
No. JD201600066
The Honorable John F. Kelliher Jr., Judge

AFFIRMED

COUNSEL

Cochise County Office of the Legal Advocate, Bisbee
By Xochitl Orozco, Legal Advocate
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Michelle R. Nimmo, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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By Ann T. Palmer
Counsel for Appellee Minor

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Brandon M. appeals from the juvenile court's March 2019 order terminating his parental rights to his daughter, E.C., born in January 2014, on the ground of abandonment.[1] *See* A.R.S. § 8-533(B)(1). On appeal, Brandon argues the court improperly terminated his parental rights before he had an adequate opportunity to establish a parental relationship with E.C. and maintains the court made an "inappropriate statement" to him at the conclusion of the severance hearing. We affirm.

¶2 To sever a parent's rights, the juvenile court must find clear and convincing evidence establishing at least one statutory ground for termination and a preponderance of the evidence that shows terminating the parent's rights is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 32, 41 (2005); *see also* A.R.S. §§ 8-537(B), 8-863(B). We will affirm the order if the findings upon which it is based are supported by reasonable evidence. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002). We view the evidence in the light most favorable to upholding the court's ruling. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12 (App. 2007). To prove abandonment, the Department of Child Safety (DCS) was required to demonstrate Brandon failed "to provide reasonable support and to maintain regular contact with [E.C.], including providing normal supervision." A.R.S. § 8-531(1); *see also* § 8-533(B)(1). What constitutes reasonable support, regular contact, and normal supervision depends on the circumstances of each case. *Kenneth B. v. Tina B.*, 226 Ariz. 33, ¶ 15 (App. 2010).

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[1]The juvenile court terminated the parental rights of E.C.'s mother to her and her two half-siblings in November 2018. The mother and half-siblings are not parties to this appeal.

¶3 Brandon, who had never met E.C. in person at the time of the severance hearing,[2] left Arizona in 2016, despite knowing that E.C. had been removed from the care of her mother, who had previously told Brandon that E.C. was his child. DCS was unable to serve Brandon with the September 2016 dependency petition until January 2017. The juvenile court then found Brandon was voluntarily absent from a February 2017 review hearing, deemed the allegations in the dependency petition admitted, and adjudicated E.C. dependent as to him.

¶4 Brandon established his paternity to E.C. in July 2017, when E.C. was more than three years old, and then informed the juvenile court he was "willing to participate in planned services now that paternity ha[d] been established." Brandon nonetheless failed to appear at hearings in September and December 2017 and in April 2018. And although he appeared at a May 2018 review hearing, his attorney confirmed that he had not participated in services and was not compliant with the case plan, which included showing he was "emotionally bonded with and willing to care for" E.C., could "provide a safe and stable environment" for her, and would demonstrate "he understands [E.C.'s] needs take priority above his own needs and wants on a consistent basis." The court granted DCS's request to change the case plan to severance and adoption, and in November 2018, DCS filed a motion to terminate Brandon's parental rights to E.C. based on abandonment.

¶5 At the March 2019 severance hearing, the case manager previously assigned to the family testified that Brandon had failed to: show he could provide a safe and stable environment for E.C.; request telephone contact or in-person visits with her; or send cards or presents to her. The current case manager similarly testified that in the previous two years, Brandon had not made "a trip down" to visit E.C. or asked his case manager to facilitate contact with her, nor had he provided cards, gifts or reasonable support for her. Brandon testified he did not have a "normal" parent-child relationship with E.C. He acknowledged he did not pursue further visits after being told he would have to first comply with his case plan.

¶6 At the conclusion of the termination hearing, the juvenile court severed Brandon's parental rights to E.C. based on the ground of abandonment, found that severance was in E.C.'s best interests, and directed DCS to file findings of fact and conclusions of law. In its final

[2] In 2017, Brandon spoke to E.C. through "Facebook Messenger" roughly five times for a total of approximately twenty-five minutes.

ruling, the court found clear and convincing evidence that Brandon had "failed to provide reasonable support and to maintain regular contact with [E.C.], including normal supervision. [He] ha[d] made only minimal efforts to support and communicate with [E.C.]" And Brandon "fail[]ed to maintain a normal parental relatio[ns]hip with [E.C.] for a period in excess of six months, without just cause." In its best-interests finding, which Brandon does not challenge on appeal, the court pointed out that E.C. "does not even know [Brandon] and [he] has never even seen [her] in person," and that "[t]aking her from the only family she has ever known and placing [her] with a man she does not know would not be in her best interests."

¶7 On appeal, Brandon first argues the juvenile court improperly terminated his parental rights based on abandonment. He complains that DCS failed to timely commence a home study under the Interstate Compact on the Placement of Children (ICPC) to provide him with services in Washington, where he was living. He also asserts that DCS neglected to "gradually expose" him to E.C. "via phone, Skype or any other means," as it had stated it would do. At the June 2017 review hearing, Brandon's attorney informed the court he had not had any contact with his client and requested a case plan under the ICPC.[3] DCS apparently did not complete the ICPC until November 2018, and according to Brandon, instead directed him to "find his own services [in Washington] and report back to DCS on what he had found." Brandon argues he was unable to comply with the case plan without "minimal help" from DCS. He further suggests he did, in fact, comply with the case plan by establishing paternity and requesting an ICPC case plan.

¶8 However, as DCS correctly points out in its answering brief, Brandon "essentially had abandoned E.C. for nearly three years before DCS even became involved." Brandon testified that E.C.'s mother had informed him "she was pregnant with [his] kid," and friends had told him E.C. looked like him. And, although Brandon stated that E.C.'s mother had told him in September 2016 that DCS had removed E.C. from her care, he did not contact DCS at that time; instead, it took DCS several months to locate Brandon in order to serve him with the dependency petition. In addition, as previously noted, Brandon failed to attend multiple hearings even after he was served with the petition.

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[3]Directing us to this testimony, Brandon points out that his current DCS case manager inaccurately testified that the "only time [he] had come forward to request something was a couple of weeks before severance to request . . . an ICPC" for E.C.

¶9 "Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment." § 8-531(1). The record shows that by the time Brandon established paternity in July 2017, he had not established any parental relationship with E.C., much less a normal one. Nor had he provided any support for her in the three years since she was born. *See In re Pima Cty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97 (1994) (unwed father who has never had relationship with child must "act, and act quickly" to avoid termination based on abandonment). Notably, Brandon acknowledges on appeal that he "should have called every day and requested visits and phone calls," and that he "did not do that."

¶10 We recognize that "[t]he concept of abandonment and terms such as 'reasonable support' or 'normal parental relationship' are somewhat imprecise and elastic." *In re Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4 (1990). Accordingly, "questions of abandonment . . . are questions of fact for resolution by the [juvenile] court." *Id.* On appeal, Brandon essentially asks this court to reweigh the evidence, which we will not do. *See Jesus M.*, 203 Ariz. 278, ¶ 12. Instead, we defer to the juvenile court, which is "in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004). Here, as the court made clear in its ruling, DCS established by clear and convincing evidence that Brandon abandoned E.C., a ruling the evidence amply supports. On the record before us, we are not persuaded by Brandon's suggestion that a more-promptly implemented ICPC case plan or graduated telephone communication with E.C. would have impacted the outcome in this case. "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct: the statute asks whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 18 (2000). Here, Brandon had never met or supported E.C. in the five years since her birth.

¶11 In his second argument on appeal, Brandon contends the juvenile court made a comment showing its ruling "was not based on proper analysis." At the severance hearing, Brandon testified he is an assistant manager at an automotive oil change shop. After severing Brandon's parental rights, the court told him, "[k]eep changing the oil and putting the oil pan nut back in so the oil doesn't run out before they [drive]

them off."[4] Brandon argues the court was "[m]aking fun" of his profession and that its comment violated § 8-537(B). That statute requires the court to base its findings with respect to termination "upon clear and convincing evidence under the rules applicable and adhering to the trial of civil causes." Acknowledging he did not challenge the court's comment "on bias or for cause" below, Brandon nonetheless suggests the court was not fair and impartial, and asks that we "scrutinize[]" the court's findings "based on this improper conduct."

¶12 "A trial judge is presumed to be free of bias and prejudice and to overcome this presumption, a party must show by a preponderance of the evidence that the trial judge was, in fact, biased." *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 19 (App. 2012). With the exception of an isolated comment he considers inappropriate, Brandon has not directed us to any portion of the record suggesting the court was biased against him or that it did not treat him fairly. "[M]ere speculation about bias is not sufficient." *Emmett McLoughlin Realty, Inc. v. Pima Cty.*, 212 Ariz. 351, ¶ 24 (App. 2006). In fact, the court also told Brandon its ruling was "not personal," Brandon had "tried too little too late," and he was "a pretty decent guy [who could] make the world a little better." We thus conclude Brandon has failed to establish judicial bias requiring further scrutiny by this court. *See United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 308 (App. 1983) ("Appeals lie from findings of fact, conclusions of law, and judgments, not from ruminations of the trial judge.").

¶13 Accordingly, we affirm the juvenile court's order severing Brandon's parental rights to E.C.

[4]We note such comments, even if intended to be supportive or to relieve tension in the context of delivering an adverse ruling, are subject to misinterpretation and therefore best avoided.